Meenachi Holding & Trading (M) Sdn Bhd v Serba Kemas Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-01–699–11 OF 2011
ABU SAMAH NORDIN, ALIZATUL KHAIR AND AZIAH ALI JJCA
12 OCTOBER 2015

Land Law — Surrender and re-alienation of lands — Application for — Owners of separate parcels of land applied for surrender and re-alienation of lands for development purpose — Land office amalgamated lands under one title and registered same in name of one party only — Whether such action contravened s 204B of NLC and void — Whether in 'surrender and re-alienation' exercise under ss 204A, 204B, 204C, 204D, 204E, 204F, 204G and 204H of the NLC state authority only had discretion to approve or reject application and not to decide ownership of re-alienated land — Whether transfer of re-alienated land to third party defeasible under s 340 of the NLC — Whether in action to set aside impugned transfer failure to join party in whose name re-alienated land solely registered not fatal — Whether no cause or matter shall fail simply because of misjoinder or non-joinder of party — Rules of Court 2012 O 15 r 6 — National Land Code ss 204A, 204B, 204C, 204D, 204E, 204F, 204G and 204H

The appellant and another company ('Cayman') owned lands ('the lands') that adjoined each other. Pursuant to a joint venture agreement between the parties to develop the lands into an industrial park, the appellant executed a power of attorney in Cayman's favour empowering the latter to apply for conversion and subdivision of the lands. Cayman surrendered the lands to the state authority for re-alienation under s 204 of the National Land Code ('the NLC'). The lands were amalgamated under one title and re-alienated to and registered solely in Cayman's name. When Cayman sold the re-alienated land to the first respondent ('Serba Kemas'), the appellant, besides lodging a private caveat, filed a suit in the High Court to declare the transfer to Serba Kemas as null and void and to order the second respondent to register the re-alienated land in the names of both the appellant and the liquidators of Cayman (or, alternatively, Serba Kemas) in accordance with the shares they respectively owned in the land, ie that of the total 33,733 square metres that made up the re-alienated land, 24,476 square metres originally belonged to the appellant while the remainder was Cayman's. The High Court dismissed the appellant's claim holding that Serba Kemas was a bona fide purchaser for value and that the appellant's failure to cite Cayman (which by then had already been wound up) as a party to the suit was fatal. The crux of the appellant's case was that the second respondent's registration of the re-alienated land solely in Cayman's name breached the 'surrender and re-alienation' provisions under ss

204A–204H of the NLC, in particular, s 204B. The appellant argued that under those provisions the state authority only had discretion to approve or reject an application for surrender and re-alienation and not to decide on the ownership of the re-alienated land. The appellant also argued that the particulars in the issue document of title to the alienated land itself showed that the title was a title in continuation and, by virtue of ss 170 and 186 of the NLC, a title in continuation must be prepared in the name of the person or body last registered in the register document of title. The appellant contended that since the issuance of the title solely in Cayman's name was ultra vires s 204B of the NLC and void, the subsequent transfer of the land to Serba Kemas was defeasible under s 340 of the NLC. As to the non-joinder of Cayman to the original suit, the appellant argued that the trial judge was wrong to regard it as fatal as the appellant did not seek any claim against Cayman but merely sought a declaration that its share in the re-alienated land be restored; that, in any event, O 15 r 6 of the Rules of Court 2012 ('the ROC') provided that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party.

Held, allowing the appeal, setting aside the decision of the High Court and allowing the appellant's claim:

(1) The issuance of the issue document of title in the sole name of Cayman breached s 204B of the NLC. The second respondent acted ultra vires in issuing such a title. As the first respondent's interest in the land was obtained by means of an insufficient or void instrument it was defeasible under s 340(2)(b) of the NLC. As the first respondent was an immediate transferee, in that the land was transferred to it by Cayman, it could not avail itself of the protection afforded by the proviso to s 340(3) of the NLC. The proviso only applied to a subsequent purchaser (see paras 95–96 & 98).

(2) The High Court was wrong in holding that the effect of the non-joinder of Cayman was fatal to the appellant's case. Cayman was not a necessary party to the action. The appellant was seeking declaratory reliefs that the first respondent's title was defeasible under s 340 of the NLC and for the second respondent to restore the appellant's share in the land. It had no claim or decided not to claim against Cayman. Furthermore, O 15 r 6 of the ROC stipulated that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party (see paras 101–102 & 109).

(3) Pursuant to ss 204B and 186 of the NLC, the appellant and Cayman should have been named as the proprietors of their respective proportions in the re-alienated land. Under s 204B of the NLC, land surrendered under the provisions of ss 204A–204H must be re-alienated to the proprietor under whose name it was registered. 'Proprietor' under s 5 of the NLC meant 'any person or body for the time being registered as the

proprietor of any alienated land'. This legal position was consistent with s 186 of the NLC which stipulated that the title derived from amalgamation and subdivision should at all times be prepared in the names of the persons or body last registered as proprietor in the subsisting register document or documents of title (see paras 66–67 & 87).

(4) The first respondent's contention that when land was surrendered under s 204B of the NLC, the original proprietor's rights were extinguished and therefore no title in continuation could be issued did not have merit. It was only in cases of surrender and re-alienation under s 195 of the NLC that s 199 provided that 'the provision of s 131 shall apply as if the land had reverted pursuant to a forfeiture'. No such or similar provision was found in respect of land surrendered and re-alienated pursuant to s 204B of the NLC. The fact that the original title numbers of the land were recorded in the document of title by the land office was clear evidence the said title was a title in continuation (see paras 71–74 & 85–86).

(5) In a 'surrender and re-alienation' exercise under ss 204A–204H of the NLC, the state authority was not vested with a discretion to decide on the ownership of the land as that would be contrary to the provisions of ss 204B and s 186 of the NLC. Pursuant to the latter two provisions, the state authority in exercising its power under s 204E only had discretion to approve or reject the application for surrender and re-alienation made in Form 12D (see paras 77 & 81).

[Bahasa Malaysia summary

Perayu dan satu lagi syarikat ('Cayman') memiliki tanah ('tanah tersebut') yang bersebelahan dengan satu sama lain. Berikutan satu perjanjian usaha sama antara pihak-pihak untuk membangunkan tanah tersebut menjadi pusat industri, perayu memasuki surat kuasa wakil bagi pihak Cayman, memberi kuasa kepadanya untuk memohon tukar syarat dan pecah bahagian tanah. Cayman menyerahkan tanah tersebut kepada pihak berkuasa negeri bagi pemberimilikan semula di bawah s 204 Kanun Tanah Negara ('KTN'). Tanah tersebut telah disatukan di bawah satu hak milik dan diberi milik semula kepada dan didaftarkan di bawah nama Cayman sahaja. Apabila Cayman menjual tanah berimilik semula tersebut kepada responden pertama ('Serba Kemas'), perayu, selain memasukkan kaveat persendirian, memfailkan guaman di Mahkamah Tinggi untuk mengisytiharkan pindah milik kepada Serba Kemas terbatal dan tidak sah dan mengarahkan responden kedua mendaftarkan tanah berimilik semula tersebut di bawah nama kedua-dua perayu dan pelikuidasi Cayman (atau secara alternatifnya, Serba Kemas) selaras dengan bahagian tanah yang masing-masing miliki, iaitu jumlah 33,733 meter persegi yang membentuk tanah berimilik semula, 24, 476 meter persegi yang asalnya dimiliki oleh perayu manakala bakinya milik Cayman. Mahkamah Tinggi menolak tuntutan perayu bahawa Serba Kemas adalah pembeli suci hati bagi satu balasan dan bahawa kegagalan perayu untuk menamakan Cayman

(yang telah digulung) sebagai pihak dalam guaman menjejaskan. Inti pati kes perayu adalah bahawa pendaftaran responden kedua atas tanah berimilik semula di bawah nama Cayman melanggar peruntukan 'penyerahan dan pemberimilikan semula' di bawah ss 204A–204H KTN, khasnya s 204B. Perayu menghujahkan bahawa dibawah peruntukan tersebut, pihak berkuasa negeri hanya mempunyai budi bicara untuk meluluskan atau menolak permohonan penyerahan dan pemberimilikan semula dan bukan untuk memutuskan milikan bagi tanah berimilik semula. Perayu juga menghujahkan bahawa butir-butir dalam dokumen hak milik pengeluaran bagi tanah berimilik semula dengan sendirinya menunjukkan bahawa hak milik adalah hak milik berterusan dan, di bawah ss 170 dan 186 KTN, satu hak milik berterusan mesti disediakan di bawah nama pihak atau badan yang akhir sekali didaftarkan dalam dokumen hak milik. Perayu menghujahkan bahawa kerana pengeluaran hak milik di bawah nama Cayman adalah ultra vires s 204B KTN dan terbatal, pindah milik tanah seterusnya kepada Serba Kemas boleh disangkal di bawah s 340 KTN. Bagi kegagalan menamakan Cayman dalam guaman asal, perayu menghujahkan bahawa hakim bicara khilaf kerana menganggap bahawa adalah menjejaskan kerana perayu tidak membuat apa-apa tuntutan terhadap Cayman tetapi sekadar meminta pengisytiharan bahagiannya dalam tanah berimilik semula dikembalikan; bahawa, dalam apa jua keadaan A 15 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM') memperuntukkan bahawa tiada kausa atau hal perkara yang terlupus akibat kesalahgabungan atau kegagalan menggabungkan mana-mana pihak.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan tuntutan perayu:

(1) Pengeluaran dokumen hak milik keluaran di bawah nama tunggal Cayman melanggar s 204B KTN. Responden kedua bertindak ultra vires dalam mengeluarkan hak milik sedemikian. Oleh kerana kepentingan responden pertama pada tanah tersebut diperolehi melalui instrumen yang tidak lengkap atau tidak sah, ia boleh disangkal di bawah s 340(2)(b) KTN. Oleh kerana responden pertama penerima pindahan serta-merta, dalam mana tanah dipindah milik kepadanya oleh Cayman, ia tidak boleh mengguna pakai perlindungan yang diperuntukkan oleh proviso s 340(3) KTN. Proviso hanya terpakai pada pembeli seterusnya (lihat perenggan 95–96 & 98).

(2) Mahkamah Tinggi khilaf dalam memutuskan bahawa kesan kegagalan menggabungkan Cayman menjejaskan kes perayu. Cayman bukan pihak yang perlu dalam tindakan itu. Perayu memohon pengisytiharan relief agar hak milik responden pertama boleh disangkal di bawah s 340 KTN dan agar responden kedua mengembalikan bahagian perayu dalam tanah. Ia tidak mempunyai apa-apa tuntutan atau memutuskan untuk tidak membuat tuntutan terhadap Cayman. Tambahan lagi, A 15 k 6 KKM menetapkan bahawa tiada kausa atau hal perkara yang boleh

dilupuskan dengan sebab kesalahgabungan atau kegagalan menggabungkan mana-mana pihak (lihat perenggan 101–102 & 109).

(3) Di bawah ss 204B dan 186 KTN, perayu dan Cayman sepatutnya dinamakan sebagai tuan punya bahagian masing-masing bagi tanah berimilik semula. Di bawah s 204B KTN, tanah yang diserahkan di bawah peruntukan ss 204A–204H mesti diberi milik semula kepada pemilik yang namanya telah didaftarkan. 'Pemilik' di bawah s 5 KTN bermaksud 'mana-mana orang atau badan yang pada masa itu didaftarkan sebagai pemilik mana-mana tanah beri milik'. Kedudukan undang-undang ini konsisten dengan s 186 KTN yang menetapkan bahawa hak milik yang diperolehi daripada penyatuan dan pecah sempadan hendaklah pada setiap masa disediakan di bawah nama-nama orang atau badan terakhir didaftarkan sebagai pemilik dalam dokumen daftaran atau dokumen hakmilik (lihat perenggan 66–67 & 88).

(4) Hujahan responden pertama bahawa apabila tanah telah diserahkan di bawah s 204B KTN, hak pemilik asal dilupuskan dan oleh itu tiada hak milik sambungan boleh dikeluarkan tidak bermerit. Hanya dalam kes-kes serahan dan pemberimilikan semula di bawah s 195 KTN yang memperuntukkan bahawa 'peruntukan s 131 hendaklah terpakai seolah-olah tanah itu telah dikembalikan menurut suatu perlucuthakan'. Tiada peruntukan serupa bagi tanah yang diserahkan dan diberi milik semula di bawah s 204B KTN. Fakta bahawa nombor hak milik asal tanah telah direkodkan dalam dokumen hak milik pejabat tanah adalah bukti jelas hak milik tersebut adalah hak milik sambungan (lihat perenggan 71–74 & 85–86).

(5) Dalam langkah 'penyerahan dan pemberimilikan semula' di bawah ss 204A-204H KTN, pihak berkuasa negeri tiada kuasa budi bicara untuk membuat keputusan mengenai hak milik tanah kerana ia bertentangan dengan peruntukan ss 204B dan 186 KTN. Selaras dengan kedua-dua peruntukan, pihak berkuasa negeri dalam menjalankan kuasanya di bawah s 204E, hanya mempunyai budi bicara untuk meluluskan atau menolak permohonan penyerahan dan pemberimilikan semula yang dibuat dalam Borang 12D (lihat perenggan 77 & 81).]

Cases referred to

Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal [2008] 3 MLJ 530; [2008] 3 CLJ 323, CA (folld)

Golden Approach Sdn Bhd v Pengarah Tanah dan Galian [2001] 1 MLJ 411, HC (refd)

Ibeneweka v Egbuna [1964] 1 WLR 219, PC (refd)

Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals [1997] 3 MLJ 23; [1997] 4 CLJ 253, CA (refd)

London Passenger Transport Board v Moscrop [1942] AC 332, HL (distd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (folld)
Tajjul Ariffin bin Mustafa v Heng Cheng Hong [1993] 2 MLJ 143, SC (refd)
Tan See Hock v Development & Commercial Bank Bhd & Anor [1993] 3 MLJ 250, HC (distd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)
Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased) [2010] 4 MLJ 312, FC (refd)
United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b, HC (refd)
Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 8 MLJ 713, HC (refd)

Legislation referred to

National Land Code ss 5, 5A, 8, s 76, 79(2), 92, 131, 131(a), 170, 186, 186(1), 195, 198, 199, 204, 204A, 204B, 204C, (1), 204D, (1), (1)(c), 204E, (1), (2), (3), 204F, 204G, 204G(2), 204H, 292, 292(1)(a), 340, 340(1), (2), (2)(b), (2)(c), (3), Form 12D, Fourteenth Schedule
Rules of Court 2012 O 15 r 6
Rules of the High Court 1980 O 15 rr 6, 6(2)(b)(ii)
Trade Disputes and Trade Unions Act 1928 s 6(d)

Appeal from: Civil Suit No 22–02 of 2008 (High Court, Alor Setar)

CK Yeoh (Ranjit Singh with him)(Ranjit Singh Dhillon & Co) for the appellant.
Tan Yee Boon (Cheng Yee Ling with him) (Khaw & Partners) for the first respondent.
Fariza bt Hamzah (Senior Federal Counsel, State Legal Advisor of Kedah) for the second respondent.

Alizatul Khair JCA:

[1] This appeal arose from the decision of the High Court judge in Alor Setar in respect of a consolidated action, whereby the learned judge:

(a) dismissed the appellant's (the plaintiff's) claim against the first and second respondents; and

(b) dismissed the first respondent's originating summons for the removal of the appellant's caveat with costs.

For the purpose of this judgment the appellant and the respondents will be referred to as they were originally referred to in the court below.

BACKGROUND

[2] The undisputed facts of the case were as follows:

[3] The plaintiff was the registered proprietor of several pieces of land in Mukim Seluang, Daerah Kulim including a plot of land known as SPK 5589, Lot 665 (Lot 665) ('the plaintiff's lands'). Cayman Development (SP) Sdn Bhd ('Cayman') was the registered proprietor of the adjoining lots known as Lots 183, 186 and 187 ('Cayman's lands').

[4] On 18 September 1995 the plaintiff entered into a joint venture agreement ('JVA') with Cayman with the intention of developing the plaintiff's lands and Cayman's lands in the surrounding area into 'Cayman Industrial Park' (except for Lot No 168, SPK 3001 and Lot No 188, SPK 3015). The project encompassed the construction of commercial and industrial buildings. Under the JVA, it was agreed, inter alia, that Cayman shall:

(a) pay for the conversion and subdivision fees when approval for conversion and subdivision has been obtained; and

(b) bear all costs and expenses in respect of conversion, amalgamation and sub-division of the said lands (cll 3(a) and (b) of the JVA).

[5] Pursuant to the JVA, the plaintiff executed a power of attorney dated 13 December 1994 ('PA') in favour of Cayman providing for Cayman to do, inter alia, the following:

> 1 To attend to the development of the aforesaid land including *making applications to the relevant authorities for approval for the conversion of the said land* into commercial and industrial project as well as for approval of all plans including housing and building plans and other matters relating to the development as aforesaid of the Land.
>
> 2 *To make application to the proper authority or authorities for subdisivision of the said Land* for the purpose of such developments of the said land and the building thereof (Emphasis added.)

[6] On 2 August 1995 Cayman surrendered the plaintiff's lands and Cayman's lands ('the said lands') to the state authority for re-alienation under s 204 of the National Land Code 1965 ('the NLC'). The said lands were re-alienated as HS(M) 960/96 Lot No PT 5700 Bandar Kulim ('the said land') and registered in the name of Cayman on 8 September 1996.

[7] The said land was designated as a recreation area ie 'Tapak Tumpuan Rekreasi'.

[8] On 11 July 1998, Cayman sold the said land for a sum of RM450,000 to Serba Kemas Sdn Bhd ('the first defendant') and a sale and purchase agreement was executed between the parties (P6).

[9] On 13 May 2000, the plaintiff lodged a private caveat ('the first caveat') on the said land. The first caveat was removed upon application by the first defendant to the Kulim Land Office on 28 October 2004. The plaintiff's application for an order to extend the first caveat was dismissed by the High Court vide its order dated 3 August 2001.

[10] On 15 August 2005, the plaintiff entered a fresh private caveat ('the second caveat') on the said land based on the same ground relied on for entry of the first caveat.

[11] The first defendant then filed an Originating Summons (SP 24-2453-07) on 28 October 2007 ('the OS') to set aside and cancel the second caveat.

[12] On 5 January 2008, the plaintiff filed Civil Suit No 22–02 of 2008 ('the civil suit') seeking, inter alia, the following reliefs:

(a) a declaration that the transfer of land held under H.S.(M) 760/96, PT No. 5700, Mukim Seluang, Daerah Kulim, Kedah Darul Iman to the first defendant is null and void;

(b) a declaration that the said Land shall be registered in the following proportions:

(i) 24476/33733 in favour of the plaintiff; and

(ii) 9257/33733 in favour of the liquidators of Cayman Development (SP) Sdn Bhd (Cayman) or the 1st Defendant; and

(c) a declaration that the 2nd defendant transfers the said Land in the proportion aforesaid.

[13] Both the OS and civil suit were consolidated and heard together by the learned judge in the court below.

DECISION OF THE HIGH COURT

[14] As stated earlier, the learned judge found at the end of the trial that the plaintiff had failed to prove its case on a balance of probabilities and dismissed the plaintiff's claim with costs to be taxed. The learned judge also dismissed the first defendant's OS. The learned judge's decision was premised essentially on the following findings:

(a) the first defendant was a bona fide purchaser for value vide the sale and purchase agreement (P6) . There was no evidence of fraud. As such the Federal Court decision in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 would apply; and

(b) Cayman should have been made a party to the proceedings. Failure by the plaintiff to cite Cayman as a party was fatal.

MAIN ISSUE

[15] The crux of the plaintiff's case as reflected in para 10 of their statement of claim was that the said land should not be registered in the name of Cayman solely but should be in the name of the plaintiff and Cayman in accordance with the proportion of the lands surrendered and re-alienated to make up the said land.

[16] In this regard the plaintiff, as seen earlier, claimed they were entitled to 24,476/33,733 shares in the said land whilst the first defendant was only entitled to 9,257/33,733 shares.

[17] The plaintiff's claim that they were entitled to the aforesaid proportion in the said land was based on the following undisputed facts:

(a) the said land was derived from lot 665 belonging to the plaintiff and lots 183, 186 and 187 belonging to Cayman; and

(b) the total area of the said land was 33,733 sq meters of which 24,476 sq meters was derived from lot 665 (ie the plaintiff's land) and the balance 9,257 was derived from lot 183, 186 and 187 which belonged to Cayman as shown on P8 (p 225, Part B, of the records of appeal).

SUBMISSIONS

The plaintiff

[18] The plaintiff relied primarily on the provisions pertaining to the procedure for surrender and re-alienation under ss 204A–204H of the NLC. In particular, the plaintiff relied on s 204B of the NLC which reads as follows:

> The State Authority may approve the surrender of any one or more contiguous alienated lands held under final title or qualified title or a combination thereof held by the *same proprietor* on the terms that certain portions of the land comprised therein be *immediately re-alienated to the proprietor* in different portions and units or in different units.

'Proprietor' in turn is defined as '*any person or body for the time being registered*

as the proprietor of any alienated land' (s 5 of the NLC).

[19] This is fortified further by s 186 of the NLC which provides that the new subdivided titles shall be prepared in the name of the person or body last registered as proprietor and the like memorials, endorsement and other entries as are found in the subsisting register document or documents.

[20] In addition, under s 204E of the NLC the state authority only has the discretion to either approve or reject the application for surrender and re-alienation under s 204D of the NLC.

[21] In a surrender and alienation exercise under ss 204A–204H of the NLC the state authority is not conferred any discretion to decide on the ownership of the land. Such discretion would run counter to the provisions of s 204B and s 186 of the NLC.

[22] Based on the above provisions, the plaintiff contended that SD3's (the Pentadbir Tanah Daerah Kulim) testimony that it was entirely within the discretion of the state authority to decide who the said land should be alienated to was incorrect.

[23] In accordance with the aforesaid provisions therefore the said land should have been re-alienated to the plaintiff and Cayman, in their respective proportions and not to Cayman alone.

[24] To lend further support to their argument the plaintiff referred to the issue document of title which states:

> Hendaklah dipenuhkan apabila hakmilik dikeluarkan bagi sambungan.
>
> Tarikh mula-mula diberi milik ...
>
> No. Hakmilik asal (tetap atau sementara) ...
>
> No. Hak milik yang akhir sekali (jika berlainan daripada yang di atas ...

And in the column 'No Hakmilik asal (tetap atau sementara) ...'

It was contended that the land office had written:

> SPK 3011, SPK 3013-SPK 3015, SPK 3001-SPK 3002, SPK 5586-SPK 5602

confirming that the title issued was a title in continuation.

[25] As provided by s 170 (in respect of final title) and s 186 (in respect of qualified title) of the NLC, the contents of a title in continuation must be

prepared in the name of the person or body last registered in the subsisting register document or documents of title.

[26] In the light of the aforesaid provisions of the NLC the effect of the plaintiff not being named as the co-proprietor of the said land with Cayman was, in the plaintiff's view, to render the issuance of the title to the said land void. That being so, it was the plaintiff's contention that the first defendant's title as registered proprietor is defeasible under s 340(2)(b) and (c) of the NLC.

[27] Section 340(2) reads as follows:

> 340(2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an *insufficient or void instrument*; or
>
> (c) where the title or interest was *unlawfully acquired* by the person or body in *the purported exercise of any power or authority conferred by any written law*.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[28] In relation to s 340(2)(c) of the NLC where the title or interest of a person or body for the time being registered as proprietor is not indefeasible by virtue of it being unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law, the plaintiff referred firstly to the case of *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b. There the High Court held that the registrar of titles had acted ultra vires the powers conferred upon him when he registered the charge in breach of an express restriction in interest on the title ie the land could not be charged without the written sanction of the state authority.

[29] The aforesaid case, as pointed out by learned counsel for the plaintiff was cited with approval by the Federal Court in *Toh Huat Khay v Lim A Chang (in his capacity as the executor of the estate of Toh Hoy Khay, deceased)* [2010] 4

MLJ 312 and the Supreme Court in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294.

[30] Counsel also relied on the recent case of *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713 which adopted the decisions in *United Malayan Banking Corporation* and *M&J Frozen Food Sdn Bhd.*

[31] In *Uptown Properties*, the High Court held that the issuance of the computerised title in the name of the fourth defendant as a registered proprietor by the land office was ultra vires as it contravened the provisions of s 5A and the Fourteenth Schedule as well as s 340(2)(c) of the NLC.

[32] In relation to s 340(2)(c) the learned judge found that in view of the fact that the title was issued to the fourth defendant in breach of s 8 of the Fourteenth Schedule of the NLC, the fourth defendant title was also in breach of s 340(2)(c) of the NLC and was therefore void.

[33] In the same manner that the issue document of title was held to be ultra vires in *Uptown Properties* the plaintiff opined that the issuance of the issue document of title in the name of Cayman alone was clearly ultra vires s 204B of the NLC and is consequently void.

[34] Following from the above proposition and applying the principles enunciated in *Uptown Properties*, the plaintiff further contended that the first defendant's interest in this case was obtained by a void and/or insufficient instrument as provided under s 340(2)(b) of the NLC .

[35] Thus, the first defendant's title and interest in the said land was defeasible by virtue of s 340(2)(b). Applying *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 the plaintiff contended that the proviso to s 340(3) of the NLC was not applicable to the first defendant as they were not a subsequent purchaser but an immediate transferee.

[36] On the issue of non-joinder of Cayman as party which was held by the learned judge to be fatal to the plaintiff's case, the plaintiff referred to the Court of Appeal decision in *Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal* [2008] 3 MLJ 530; [2008] 3 CLJ 323 which adopted Lord Diplock's proposition in *Vandervell Trustees Limited v White & Ors* that 'a party to an action must be a person who claims in that action some relief against another party to the action or against who some relief is claimed by another party to the action'.

[37] The plaintiff contended that the plaintiff here is seeking declaratory reliefs in order to defeat the first defendant's rights as a registered proprietor to the said land on the ground that the first defendant title is defeasible by virtue of s 340(2)(b) and (c) of the NLC and for the second defendant to restore the plaintiff as holding 24,476/33,733 share and Cayman 9,257/33,733 share in the said land. The plaintiff has no claim or has decided not to claim against Cayman. This according to the plaintiff is their prerogative.

[38] The plaintiff also referred to O 15 r 6 of the Rules of the High Court 1980 which stipulates that no matter can defeated by misjoinder or non-joinder of any party. This principle was reiterated in *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143.

THE FIRST DEFENDANT

[39] The first defendant on the other hand argued firstly, that Cayman was an essential party to the action and should have been made a party to the suit for the following reasons:

(a) The plaintiff here is seeking a relief that affect the interest of Cayman as can be seen from prayer 13(c)(ii) of the plaintiff's statement of claim which reads as follows:

> (c) Satu deklarasi bahawa hartanah yang dikenali sebagai No HS(M) 960/96, No PT 5700, Mukim Sungai Seluang, Daerah Kulim, Negeri Kedah Darul Aman akan diletak hak seperti berikut:
>
> (i) 24476/33733 syer dalam nama Meenachi Holding And Trading (M) Sdn Bhd iaitu Plaintif di sini; dan
>
> (ii) 9257/33733 syer-syer dalam nama Pegawai Liquidasi Cayman Development (SP) Sdn Bhd atau Serba Kemas Sdn Bhd.

[40] The first defendant referred to the case of *London Passenger Transport Board v Moscrop* [1942] AC 332 (HL) which held that '... the court have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, *except in very special circumstances*, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made'. (Emphasis added.)

[41] The aforesaid principle was adopted by the Supreme Court in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and Other Appeals* [1997] 3 MLJ 23 at p 46 ; [1997] 4 CLJ 253 at p 282 vide Lord Radcliffe's observation in *Ibeneweka v Egbuna* [1964] 1 WLR 219 at p 226.

[42] Secondly, the plaintiff had also made allegations that Cayman had acted unconscionably in exercising the said power of attorney.

[43] Thirdly, by this suit the plaintiff had opened Cayman to a potential suit from the defendant.

[44] Fourthly, it was the first defendant's contention that with regard to the issue of surrender and re-alienation the state authority has absolute discretion in the matter as provided for in s 204E(1) of the NLC subject only to the conditions specified in s 204C(1) of the NLC.

[45] Section 204E(1) states in the following terms:

> The approval or rejection of an application under sub-sections 204D(1) shall be at the discretion of the State Authority, but the State Authority shall not approve any such application unless it is satisfied that the conditions specified in section 204C(1).

According to the first defendant none of the conditions under s 204C(1) of the NLC apply to the present case.

[46] The first defendant further contended that the plaintiff's reliance on s 186 of the NLC was misconceived as s 186 deals only with qualified title and is applicable only in the case of 'sub-division, partition or amalgamation'. It does not apply in the case of surrender and re-alienation.

[47] When Lot 665 (the plaintiff's land) was surrendered to the state, it reverts and vests in the state authority as state land.

[48] The effect of the said land being surrendered is similar to a forfeiture under s 131 of the NLC. For this proposition the first defendant is relying on James Foong J's (as he then was) decision in *Tan See Hock v Development & Commercial Bank Bhd & Anor* [1993] 3 MLJ 250. The learned judge there held that pursuant to s 199 of the NLC, land which is surrendered and re-alienated has the effect of being forfeited under s 131 of the NLC.

[49] Under s 131(a) of the NLC, the forfeited land shall be 'freed and discharged from all titles and interest subsisting or capable of arising immediately before the forfeiture took effect'.

[50] Based on the above decision, the first defendant submitted that when land is surrendered no title in continuation can be claimed as 'the original proprietor's rights like the appellant's right in Lot 665 extinguished'.

[51] Hence it was the first defendant's contention that all the plaintiff's

interests over Lot 665 would have extinguished when the said land became state land and the plaintiff's only recourse was against Cayman, the donee of the power of attorney.

[52] The first defendant reiterated that based on s 204H of the NLC the consequence of re-alienation is the same as an alienation of state land by the state authority.

[53] Section 204H of the NLC reads:

> The provisions of this Act shall apply to all questions, matters and procedures relating to a portion or unit approved for re-alienation under this Part and arising after the land in which it is comprised has reverted to the State Authority pursuant to sub-section (2) of sections 204G as they apply to the alienation of State land under this Act.

[54] Finally on the issue of indefeasibility of title, the defendant was of the firm view that by virtue of s 92 of the NLC, its title in the said land is indefeasible.

[55] It further claimed that its title to the said land cannot be defeated under s 340 of the NLC as being a bona fide purchaser for valuable consideration it falls within the scope of the proviso to s 340(3) of the NLC.

OUR DECISION

[56] At the conclusion of the hearing before us, we had unanimously allowed the appeal with costs. Our reasons for allowing the appeal were as follows:

[57] As alluded to earlier the main issue before this court was whether the said land should be registered in the name of the plaintiff and Cayman in accordance with the proportion of the lands surrendered and re-alienated to make up the said land.

[58] If the court's answer to the aforesaid issue is in the affirmative then, the next question to be determined is whether the transfer of the said land to the first defendant was null and void and therefore defeasible under s 340(2)(b) and or (c) of the NLC.

[59] Now it was not disputed that the said land was made up of Lot 665 which belonged to the plaintiff and Lots 183, 186 and 187 which belonged to Cayman.

[60] It was also not disputed that pursuant to the PA granted to it by the plaintiff, Cayman had on 2 August 1995 applied for the surrender and re-alienation of both the plaintiff's and its lands under s 204A of the NLC. These lands were then re-alienated as HS (M) 960/96 Lot No PT No 5700 and registered in the name of Cayman, solely.

[61] As seen from Form 12D at pp 331–333 of the records of appeal, the issue document of title was issued to Cayman by the second defendant through the process of surrender and re-alienation under s 204A of the NLC.

[62] In her book 'The National Land Code, A Commentary' the learned author Judith Sihombing explained that 'Sections 204A–204H are designed for those situations *where the State Authority has agreed to re-alienate the surrendered land* in a different form then previously held, *to the surrendering party*'. (Emphasis added.)

[63] According to the learned author the process of surrender and alienation under ss 204A–204H of the NLC makes it unnecessary for a land owner to use the general surrender provisions under s 195 of the NLC 'the operation of which will not result in the party surrendering being entitled automatically to re-alienation'.

[64] It should be remembered that ss 204A–204H were inserted by s 76 of the National Land Code (Amendment) Act 1984. As the heading suggests they are special provisions to enable the proprietor to effectuate these applications ie for surrender and re-alienation in a more expeditious manner.

[65] Thus, s 204B in particular provides as follows:

> The State Authority may approve the surrender of any one or more contiguous alienated lands held under final title or qualified title or a combination thereof held by the same proprietor on the terms that certain portions of the land comprised therein be immediately re-alienated to the proprietor in different portions and units or in different units.

[66] It would appear from the above provision that land surrendered under the provisions of s 204A–204H must be re-alienated to the proprietor under whose name the land was registered in. 'Proprietor' as defined under s 5 of the NLC means 'any person or body for the time being registered as the proprietor of any alienated land'.

[67] By virtue of the aforesaid definition, proprietor in the present case would mean the plaintiff and Cayman. In this regard we agreed with the submission of learned counsel for the plaintiff, that the above legal position is

consistent with s 186 of the NLC which stipulates that the title as derived from amalgamation and from subdivision should at all times be prepared in the names of the persons or body last registered as proprietor in the subsisting register document or documents. As set out in s 186(1):

> Every document of qualified title prepared on the sub-division, partition or amalgamation of any alienated land or lands-
>
> (a) shall be prepared *in the name of the person or body last registered as proprietor in the subsisting register document or documents* (or, in cased of partition, in the name of such one of those persons or bodies as may be appropriate); (Emphasis added.)

[68] *Teo Keang Sood and Khaw Lake Tee* in their book 'Land Law in Malaysia Cases and Commentary' noted that the process of surrendering and re-alienation under s 204A–204H is in effect a combined process of sub-division and amalgamation and as such the provisions of s 186 of the NLC are in our view clearly applicable in the present case.

[69] For the above reason we were unable to agree with the first defendant's contention that s 186 of the NLC is only applicable in the case of 'sub-division, partition or amalgamation' and not in the case of 'surrender and re-alienation' (under s 204A–204H).

[70] We also disagreed with the first defendant's contention that s 186 of the NLC would not apply in a case of 'surrender and re-alienation' under s 204B, as unlike the former, 'sub-division, partition or amalgamation' (under Chapter 3, Part Nine of the NLC) does not result in the land in question reverting to the state authority as state land.

[71] Relying on the case of *Tan See Hock v Development & Commercial Bank Bhd & Anor* [1993] 3 MLJ 250, the first defendant argued that when land is surrendered under s 204B, the original proprietor's rights like the plaintiff's rights in Lot 665 are extinguished and therefore no title in continuation can be issued.

[72] In *Tan See Hock*, James Foong J (as he then was) held that in the case of surrender and alienation, the said land has the effect of being forfeited under s 131 of the NLC. The effect of a forfeited land under s 131 is that the land shall be 'freed and discharged from all titles and interests subsisting or capable of arising immediately before the forfeiture took effect'.

[73] In our view *Tan See Hock* has no application to the present case as that case dealt with surrender and re-alienation under s 195 of the NLC.

[74] For surrender and re-alienation under ss 195, 199 of the NLC expressly provides that:

> Upon the making of any memorial pursuant to sub-section (4) of section 198, the land to which it relates shall revert to and vest in the State Authority as State Land; and *the provision of* section 131 *shall apply as if the land had reverted pursuant to a forfeiture*. (Emphasis added.)

No such or similar provision is found in respect of land surrendered and re-alienated pursuant to s 204B of the NLC.

[75] Instead s 204G(2) of the NLC provides that upon the surrender of the land being effected under that section, the land reverts to the state authority as state land but pursuant to s 204E of the NLC it is to be treated as approved for alienation in sub-divisional lots on terms to be determined by the state authority under the said section (see *Golden Approach Sdn Bhd v Pengarah Tanah dan Galian* [2001] 1 MLJ 411 at p 421 where Clement Skinner J (as he then was) pointed out the difference between the surrender provisions under ss 195 and 204B of the NLC).

[76] Following from the above therefore and applying s 186 of the NLC, the new sub-divided titles shall be prepared in the name of the person or body last registered as proprietor which in our case is the plaintiff and Cayman, and the like memorials, endorsements and other entries as are contained in the subsisting register document or documents.

[77] We also agreed with the plaintiff that based on s 186 and s 204B of the NLC, the state authority in exercising its power under s 204E only has discretion to either approve or reject the application for surrender and re-alienation made in Form 12D.

[78] Before approving the application, the state authority may require the proprietor to amend the application or the plans showing the Lot or Lots to be surrendered and the pre-computation plan showing, inter alia, the details of the portion and the units to be re-alienated (s 204E(2) read together with s 204D(1)(c) of the NLC).

[79] Although s 204E(3) provides that the state authority shall, upon approving the application, determine the matters set out in s 79(2) of the NLC in respect of each pattern or unit to be re-alienated as if the land comprised therein had already become state land, the subsection also stipulates that if the original title is a freehold land, the re-alienated land shall also be freehold and if it is a leasehold, the period for which the land is re-alienated shall not be less than the remainder of the lease for which the land was held under the original lease.

[80] It can be seen from the above that under s 204E of the NLC these are the only matters which the state authority may take into consideration when exercising its discretion whether to approve or reject an application for surrender and re-alienation made under Form 12D.

[81] It would appear from a reading of s 204A–204H of the NLC that in a 'surrender and re-alienation' exercise under those sections the state authority is not vested with a discretion to decide on the ownership of the land. Such a power so vested, would be contrary to the provisions of ss 204B and 186 of the NLC for the reasons stated earlier.

[82] The learned judge's finding that the testimony of the Pentadbir Daerah Kulim (SD3) that to whom the title can be issued to (upon re-alienation) is subject to the approval of the state authority 'adalah jelas dan meyakinkan' was clearly erroneous.

[83] The plaintiff had, in further support of their proposition, referred us to the issue document of title of the said land, which, based on what is stated therein would indicate that it was a title in continuation. According to the plaintiff, by virtue of s 170 (in relation to final title) and s 186 of the NLC (in respect of qualified title) the contents of a title in continuation must be prepared in the name of the person or body last registered as proprietor in the subsisting register of documents. This would mean that the title as such must be issued in the name of the plaintiff and Cayman.

[84] We have examined the issue document of title and found at the end of the document (p 335 of the record of appeal) what appeared to be a form which states to the following effect:

> Hendaklah dipenuhkan apabila hakmilik dikeluarkan bagi sambungan
>
> Tarikh mula-mula diberi milik ... No. Hakmilik asal (tetap atau sementara) SPK. 3011, SPK. 3013 – SPK. 3015, SPK. 3001 – SPK. 3002, SPK 5586 – SPK. 5602
>
> No. Hakmilik yang akhir sekali (jika berlainan daripada yang di atas) ...

[85] The plaintiff contended that the fact that the original title numbers of the said land, 'SPK 3011, SPK 3013-SPK 3015, SPK 3001-SPK 3002, SPK 3586-SPK 5602' were recorded in the document of title by the land office was clear evidence that the said title was a title in continuation.

[86] We see no reason to disagree with the plaintiff's contention as that would be the only reasonable inference to make based on the statements contained therein.

[87] For the reasons set out above, we were satisfied that based on the

provisions of ss 204B and 186 of the NLC, the plaintiff and Cayman should have been named as the proprietors of the said land in their respective proportions upon re-alienation of the said land.

[88] As observed by Judith Sihombing s 204A–204H are designed for those situations *where the state authority has agreed to re-alienate the surrendered land* in a different form then previously held, *to the surrendering party*. (Emphasis added.)

[89] Implicit in that statement is that the surrendered land must be re-alienated (albeit in a different form) to the original proprietors.

[90] Having established that the plaintiff and Cayman should have been named as the proprietors of the land in their respective proportion, the next issue for determination is whether the transfer of the said land to the first defendant by Cayman can be declared null and void so as to render its title defeasible under the NLC. The provision governing indefeasibility and defeasibility of title is s 340 of the NLC.

[91] It was not disputed that as transferee of the said land, the first defendant became the registered proprietor of the same. Pursuant to s 340(1) of the NLC, the first defendant therefore acquired an indefeasible title to the said land.

[92] Under s 340(2) of the NLC, the first defendant's title shall not be indefeasible in the following circumstances:

(a) in any of fraud or misrepresentation to which the person of body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[93] In the instant case it was the plaintiff's submission that the first defendant's title was defeasible because the registration thereof was obtained by means of an insufficient or void instrument.

[94] Instrument in s 340(2)(b) means 'an instrument of dealing' as set out in s 292 of the NLC and includes, inter alia, a memorandum of transfer. (s 292(1)(a) of the NLC).

[95] As seen earlier, the issuance of the issue document of title in the sole

name of Cayman was clearly in breach of s 204B of the NLC. In view of that the second defendant had acted ultra vires his powers when issuing the title in Cayman's name only. (Section 340(2)(c)– see the *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd*).

[96] As the title was issued in breach or ultra vires s 204B, the first defendant's interest in the said land can be said to have been obtained by means of an insufficient or void instrument and was therefore defeasible by virtue of s 340(2)(b) of the NLC.

[97] The above principle was established in the recent case of *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713. The learned judge in approving and adopting the principles established in the *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd*, *Toh Huat Khay v Lim A Chang* and *M&J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* held as follows:

> On the facts of our present case the placing of the name of the fourth defendant on the duplicate title issued by the first defendant was void as the plaintiff remains the registered proprietor of the said land and also holds the issue document of title, a mistake duly acknowledged by the first defendant. It follows in my judgment the issuance of the computerised title in the name of the fourth defendant was in breach of s 340(2)(c) of the National Land Code and was void. The fourth defendant title was also in breach of 340(2)(c) because of a breach of s 8, Schedule 14th of the National Land Code and to compound matters further, the fourth defendant is not even registered with SSM. It's a breach that strikes at the root of who the proprietor of the said land was. However since the act of issuing the fourth defendant with a duplicate title was unlawful and ultra vires, any instrument executed by the fourth defendant in favour of the fifth and sixth defendants as the vendor was a void and an insufficient instrument pursuant to s 340(2)(b) of the National Land Code and was liable to be set aside under the principle of deferred defeasibility. (Emphasis added.)

[98] As the first defendant is an immediate transferee in that the said land was transferred by Cayman to the first defendant the latter cannot avail itself of the protection afforded by the proviso to s 340(3) of the NLC. The proviso only applies to a subsequent purchaser (see *Tan Ying Hong*).

[99] The learned judge in concluding that 'Defendan Pertama telah membeli hartanah itu daripada Cayman secara suci hati melalui perjanjian Exhibit P6 ...' did so without a proper appreciation of the applicability of the proviso to s 340(3) of the NLC to the factual matrix of the case.

[100] The final issue for our consideration relates to the non-joinder of Cayman as a party to the suit.

[101] In our view the learned judge was plainly wrong when he held that the effect of the non-joinder of Cayman was fatal to the plaintiff's case. It is an undisputed fact that Cayman was wound up at the time the suit was filed.

[102] Although the plaintiff may seek leave of the winding up court to proceed against Cayman, the plaintiff decided not to because the plaintiff here was seeking declaratory reliefs that the first defendant's title is defeasible by virtue of s 340(2)(b) and (c) of the NLC and for the second defendant to restore the plaintiff as holding 24,476/33,733 share and Cayman as holding 9,257/33,733 share in the said land. The plaintiff has no claim or has decided not to claim against Cayman. On the authority of *Dato' Dr Haji Mohamed Haniffa bin Haji Abdullah & Ors v Koperasi Doktor Malaysia Bhd & Ors and another appeal* [2008] 3 MLJ 530; [2008] 3 CLJ 323, Cayman therefore was not a necessary party to this action.

[103] The aforesaid case involved an application to intervene by one, Koperasi Doktor Malaysia Bhd (KDMB) in an action brought by the plaintiffs against 20 defendants. The High Court had allowed KDMB's application to intervene.

[104] On appeal the Court of Appeal held that KDMB was not a necessary party because it would not be directly affected by any order that may be made by the High Court on the merits of the plaintiff's claim against the existing defendants. The Court of Appeal further held that since no claim had been made against KDMB by the plaintiffs or any other existing party to the action, it had failed to bring itself within O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980. Accordingly, the High Court had no jurisdiction to permit KDMB to intervene and be added as a party to the suit. In arriving at its decision, the Court of Appeal relied on Lord Diplock's observations in *Vandervell Trustees Limited v White & Ors* (see para 36 of this judgment).

[105] In the present case, as Cayman had sold the said land to the first defendant prior to the institution of this suit, it would not be directly affected by any order that may be made by the High Court other than the order restoring the ownership of the said land to the plaintiff and Cayman (and now to the first defendant being the registered owner) to be held in accordance with the proportion of the shares they hold in the said land.

[106] The case of *London Passenger Transport Board v Moscrop* cited by the first defendant in their submission can be distinguished. In that case the respondent, an omnibus driver in the service of the appellants, the London Passenger Transport Board, sought a declaration that the condition of the respondent's employment with the appellants whereby the respondent is denied, when appearing before the appellant's disciplinary board, the advantage of representation by an official of his own trade union while such

advantage is granted or is the right of other servants of the appellants who are members of another and their own trade union, is unlawful. The facts of this case were briefly this:

> It was a term of the employment of the respondent, an omnibus driver with the appellants, a public authority, that drivers appearing before a divisional superintendent hearing charges of alleged breaches of discipline or on appeal, might be accompanied by an official of a named transport trade union (that is, the Transport Union) acting as advocate. In practice, officials of that union would accompany none but its members. The respondent was not a member of that union, but on an appeal by him from a decision of a divisional superintendent, he was accompanied by an official of a different trade union to which he belonged. The appellants, however, refused to allow that official to act as the respondent's advocate or to represent him in any way.

[107] It was held by the House of Lords that the condition was not unlawful in that it did not contravene s 6(d) of the Trade Disputes and Trade Unions Act, 1928. The House of Lords also held, inter alia, that the declaration should not be granted to the respondent in an action in which the persons really interested, the named trade union, had not been joined as parties. In this regard Viscount Maugham expressed the following view:

> I also think it desirable to mention as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration ... but on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may, be indirectly prejudiced by a declaration made by the court in their absence, and that, *except in very special circumstances*, all persons interested should be made parties ... (Emphasis added.)

[108] It was quite clear from the above, that unlike our present case, the Transport Union would be directly affected by the declaration, if granted by the court and it therefore ought to have been made a party to the action.

[109] Quite apart from that, O 15 r 6 of the Rules of the High Court 1980 stipulates that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party. This rule appears to be absolute and without exception based on the observation of Edgar Joseph Jr SCJ, in the Supreme Court decision of *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 where, in setting out the general principles as to parties as culled from the rules of court and the authorities thereon, His Lordship said, inter alia, as follows:

> To this end, no action will be defeated by reason of mere mis-joinder or non-joinder

of any party which is capable of being remedied and is no defence (see *Abonloff v Oppenheimer*).

[110] Additionally His Lordship observed that 'the court has extensive discretionary powers–to add, substitute or strike out parties who are not proper or necessary, and for these purposes the court may even act of its own motion. (see O 15 r 6 of the Rules of the High Court 1980)'.

(O 15 r 6 of the Rules of the High Court 1980 though worded slightly differently, is almost in pari materia with O 15 r 6 of the Rules of Court 2012).

[111] Thus if the learned High Court judge was of the view that Cayman ought to be made a party to this suit, he could have, based on the principle stated above, exercised his discretion accordingly and added Cayman as a party.

[112] Be that as it may, based on the facts of the case and the issues before the court, we were of the view that Cayman was not a necessary party to the suit.

[113] For the above reasons the plaintiff's appeal was allowed. We set aside the learned judge's decision and granted order in terms of the following prayers in the plaintiff's statement of claim:

(a) Prayer 13(b):

> Satu deklarasi bahawa pindahmilik hartanah yang dikenali sebagai No. H.S.(M) 960/96, No. P.T. 5700, Mukim Sungai Seluang, Daerah Kulim, Negeri Kedah Darul Aman kepada Serba Kemas Sdn. Bhd. adalah tidak sah dan batal.

(b) Prayer 13(c)as amended:

> Satu deklarasi bahawa hartanah yang dikenali sebagai No. H.S.(M) 960/96, No. P.T. 5700, Mukim Sungai Seluang, Daerah Kulim, Negeri Kedah Darul Aman akan diletak hak seperti berikut:-
>
> (i) 24476/33733 dalam nama Meenachi Holding And Trading (M) Sdn. Bhd. iaitu plaintif di sini; dan
>
> (ii) 9257/33733 syer-syer dalam nama Serba Kemas Sdn Bhd

(c) Prayer 13(d) as amended:

> Satu deklarasi bahawa Defendan Kedua mendaftarkan hartanah yang dikenali sebagai H.S.(M) 960/96, P.T. 5700, Mukim Sungai Seluang, Daerah Kulim, Negeri Kedah Darul Aman tertakluk kepada perenggan (c).

We did not make any order as to damages under prayer 13(e) as the plaintiff did not wish to proceed with this claim.

[114] We awarded costs of RM30,000 here and below against the first defendant only and ordered that the deposit be refunded to the plaintiff.

Appeal allowed, decision of the High Court allowing appeal set aside and appellant's claim allowed.

Reported by Ashok Kumar